88-993

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

DANNY MICHAEL LINKOUS,

Petitioner,

v.

NANCY L. LINKOUS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTIONS PRESENTED

The judgments and orders of the Texas Court of Appeals and the Texas Supreme Court, which dismissed Petitioner's direct and statutorily authorized appeal from a district court judgment, present the following questions on certiorari:

1. Whether, as applied to Petitioner in his direct appeal of a Texas state court judgment, the scheme of the Texas "cost bond" requirements in civil cases operated to deprive Petitioner of Due Process of Law, contrary to the Fourteenth Amendment to the United States Constitution.

2. Whether, as applied to Petitioner

in his direct appeal of a Texas state court judgment, the scheme of the Texas "cost bond" requirements in civil cases operated to deprive Petitioner of Equal Protection of Law, contrary to the Fourteenth Amendment to the United States Constitution.

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

TABLE OF AUTHORITIES..... vii

OPINIONS BELOW..... 2

JURISDICTION..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 4

STATEMENT OF THE CASE..... 9

ARGUMENT AND REASONS FOR ALLOWANCE OF THE WRIT..... 18

I. As applied to Petitioner in his direct appeal of a Texas State Court judgment, the scheme of the Texas "cost bond" requirements in civil cases operated to deprive Petitioner of Due Process of Law, contrary to the Fourteenth Amendment..... 18

(a) Although there is no Constitutional right to an appeal, if a State has created appellate courts as an integral part of the system for finally adjudicating the rights of parties, the procedures used

in deciding appeals must comport with the demands of the Due Process Clause of the Fourteenth Amendment.....19

(b) The basis elements of the Due Process established by this Court were ignored by the Texas courts in Petitioner's direct appeal.....22

(c) The Texas cost bond requirement is a prerequisite for an appeal in a civil case.....28

II. As applied to Petitioner in his direct appeal of a Texas state court judgment, the scheme of the Texas "cost bond" requirements in civil cases operated to deprive Petitioner of Equal Protection of Law.....30

(a). Petitioner unequivocally demonstrated his financial inability to comply with the increased cost bond order.....30

(b) The Texas Court of Appeals refused, in Petitioner's case, to enforce Texas precedent against the court reporters.....35

III. Reasons for Allowance of the Writ.....38

CONCLUSION..... 43

PROOF OF SERVICE..... 44

TABLE OF CONTENTS
(Appendix)

APPENDIX A

Statutory Cost Bond On Appeal filed by Petitioner on September 16, 1986..... A-1

APPENDIX B

Motion to Increase Cost Bond filed on November 25, 1986, by Court Reporters..... A-4

APPENDIX C

Order of Texas Court of Appeals dated December 30, 1986, increasing the Cost Bond on Appeal..... A-8

APPENDIX D

Petitioner's Affidavit of Inability to comply with the Increased Cost Bond Order..... A-12

APPENDIX E

Order of the Texas Court of Appeals, dated July 30, 1987, extending and modifying the

increased Cost Bond Order..... A-17

APPENDIX F

Order of the Texas Court of Appeals dated January 14, 1988.... A-22

APPENDIX G

Judgment of Texas Court of Appeals dismissing Petitioner's direct appeal..... A-25

APPENDIX H

Order of Texas Court of Appeals Dismissing Petitioner's direct Appeal, dated February 18, 1988... A-27

APPENDIX I

Petitioner's Application for Writ of Error to the Texas Supreme Court..... A-38

APPENDIX J

Order of the Texas Supreme Court denying Petitioner's Application for Writ of Error..... A-61

APPENDIX K

Order of the Texas Supreme Court denying Petitioner's Motion for Rehearing, dated September 14, 1988..... A-62

TABLE OF AUTHORITIES

Page

CASES:

Federal

Boddie v. Connecticut,
401 U.S. 371 (1971)..... 22
29

Burns v. Ohio,
360 U.S. 252 (1959)..... 33

City of Cleburne v. Cleburne Living
Center, 473 U.S. 432 (1985)... 25

Draper v. Washington,
372 U.S. 487 (1963)..... 33

Eskridge v. Washington State Board
of Prison Terms and Paroles,
357 U.S. 214 (1958)..... 33

Evitts v. Lucey,
469 U.S. 387 (1985)..... 20

Gagnon v. Scarpelli,
411 U.S. 778 (1973)..... 25

Gardner v. California,
393 U.S. 367 (1969)..... 34

Griffin v. Illinois,
351 U.S. 12 (1956)..... 31
32
35

Lane v. Brown,
372 U.S. 477 (1963)..... 33

Lindsey v. Normet,
405 U.S. 56 (1972)..... 31
34
35

Logan v. Zimmerman Bush Co.,
455 U.S. 422 (1982)..... 20

Long v. District Court of Iowa,
385 U.S. 192 (1966)..... 33

Louisville & N.R. Co. v. Stewart,
241 U.S. 261 (1916)..... 29

Mathews v. Eldridge,
424 U.S. 319 (1976)..... 27

Parham v. J.R.,
442 U.S. 584 (1978)..... 25

Pennzoil Co. v. Texaco, Inc.,
107 S.Ct. 1519 (1987)..... 29
39

Roberts v. LaVallee,
389 U.S. 40 (1967)..... 34

State

Alexander v. Bowens, 581 S.W.2d
714 (Tex. Civ. App. - Dallas,
1979, no writ)..... 36

City of Engleside v. Johnson,
537 S.W.2d 145 (Tex. Civ. App. -
Corpus Christi, 1976)..... 36

Dillingham v. Putman, 109 Tex. 1, 14 S.W. 303 (1890)..... 41

Fine v. Page, 572 S.W.2d 577 (Tex. Civ. App. - Eastland, 1978).. 36

LeCroy v. Hanlon, 713 S.W.2d 335 (Tex. 1986)..... 40

Volpe v. Stephens, 589 S.W.2d 809 (Tex. Civ. App. - Dallas, 1979).... 36

CONSTITUTIONS & STATUTES

14th Amendment..... 4

28 U.S.C. Section 1257(3)..... 4

Title 2, Texas Government Code

Section 52.046..... 8

Section 52.047(A)..... 8

RULES

Texas Rules of Appellate Procedure

Rule 46..... 5

Rule 60..... 7

PUBLICATIONS

Brennan, State Constitutions and the Protections of Individual Rights, 90 Harv.L.Rev. 489 (1977)..... 41

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

Petitioner, DANNY MICHAEL LINKOUS, respectfully requests that a writ of certiorari be issued to review the Judgment of the Supreme Court of Texas, which refused to review an order

dismissing Petitioner's direct appeal, entered by the Court of Appeals of Texas, 14th District, at Houston. A motion for rehearing was denied by the Texas Supreme Court on September 14, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals of Texas dismissing Petitioner's direct appeal, delivered February 18, 1988, appears as Appendix H to this Petition. Petitioner's Application for Writ of Error to the Supreme Court of Texas appears as Appendix I. The order of the Supreme Court of Texas denying the Application for Writ of Error appears as Appendix J. The order of the Supreme Court of Texas denying Petitioner's Motion for Rehearing appears as Appendix K.

JURISDICTION

Pursuant to the Texas Rules of Civil

and Appellate Procedure, Petitioner perfected and took a direct appeal from a Texas divorce judgment to the 14th Court of Appeals of Texas, at Houston. Petitioner filed a statutorily required "cost bond" in the amount of $1000.00. The Texas Court of Appeals, on an ex parte motion of two court reporters who took testimony in the trial court, increased the "cost bond" required of Petitioner to pursue his appeal. Petitioner repeatedly claimed financial inability to post the increased bond. After Petititioner could not comply with the "cost bond" requirements, the Court of Appeals dismissed Petitioner's appeal, and refused his Motion for Rehearing, which alleged deprivation of his rights to Due Process and Equal Protection under the Fourteenth Amendment. On Application for Writ of

Error to the Texas Supreme Court [Appendix I, which again raised the Federal Constitutional claims presented herein] Petitioner's Application was "denied". Petitioner's Motion for Rehearing in the Texas Supreme Court was denied on September 14, 1988.

The Order of the Supreme Court of Texas denying Petitioner's timely Motion for Rehearing was entered on September 14, 1988. This petition is filed within 90 days of that date and is therefore timely. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> No State shall. . .deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Rule of Appellate Procedure 46 provides:

> (a) Cost Bond. Unless excused by law, the Appellant shall execute a bond payable to the appellee in the sum of $1000 unless the Court fixes a different amount upon its own motion or any interested officer of the court. If the bond is filed in the amount of $1000, no approval by the court is necessary. . . .
>
> (c) Increase or Decrease in Amount. Upon the court's own motion or motion of any party or any interested officer of the court, the court may increase or decrease the amount of the bond or deposit required. The trial court's power to increase or decrease the amount shall continue for thirty days after the bond or certificate is filed, but no order increasing shall affect

perfecting of the appeal or the jurisdiction of the appellate court. If a motion to increase the amount is granted, the clerk and the official reporter shall have no duty to prepare the record until the appellant complies with the order. If the appellant fails to comply with such order, the appeal shall be subject to dismissal or affirmance under Rule 60. No motion to increase or decrease the amount shall be filed in the appellate court until thirty days after the bond or certificate is filed. In determining the question of whether an appellant's bond or deposit should be increased to more than the minimum amount of $1000, the court shall credit the appellant with such sums as have been paid by appellant on the costs to the clerk of the trial court or to the court reporter."

. . .

(e) Payment of Court Reporters. Even if a bond is filed or deposit in lieu of bond is made, appellant shall either pay or make arrangements to pay the court reporter upon completion and delivery of the statement of facts." [emphasis supplied]

. . .

Texas Rule of Appellate Procedure 60 provides, in relevant part:

> Involuntary Dismissal.
>
> (a) Civil Cases.
>
> (1) If an appeal. . . is subject to dismissal . . . for failure of appellant to comply with any requirements of these rules or any other order of the court, the appellee may file a motion for dismissal. . . . If the ground of the motion is failure to file the transcript, the motion shall be supported by certified or sworn copies of the judgment and the appeal bond or other document perfecting or attempting to perfect the appeal or writ of error.
>
> (b) If it appears to the appellate court that an appeal or writ of error is subject to dismissal for . . . failure to comply with any requirements of these rules or any order of the court, the court may, on its own motion, give notice to all

> parties that the case will be dismissed unless the appellant or any party desiring to continue the appeal or writ of error, files with the court within ten days a response showing grounds for continuing the appeal or writ of error.

Title 2, Texas Government Code, Section 52.046, provides, in relevant part, that a court reporter must:

> "(A)(5) furnish a transcript of the reported evidence or other proceedings, in whole or in part, as provided by this chapter."

Title 2, Texas Government Code, Section 52.047(A) provides:

> "A person may apply for a transcript of the evidence in a case reported by an official court reporter. The person must apply for the transcript in writing to the official court reporter, and the court reporter shall furnish the transcript on payment of the transcript fee."

STATEMENT OF THE CASE

Petitioner and Respondent were divorced in the 247th Judicial District Court of Harris County, Texas, by Decree of Divorce signed on June 20, 1986. Petitioner perfected a direct appeal to the Court of Appeals of Texas, 14th Supreme Judicial District, at Houston. The Court of Appeals dismissed the appeal on February 18, 1988, because Petitioner was unable to post an increased cost bond to obtain a complete statement of facts. Petitioner's Motion for Rehearing was overruled by the Court on March 17, 1988. Petitioner filed an application for Writ of Error in the Texas Supreme Court, which was denied. Petitioner's motion for rehearing in the Texas Supreme Court was

denied on September 14, 1988.

This case was a direct appeal to the Court of Appeals of Texas, 14th District at Houston, from a judgment of divorce which was signed on June 20, 1986, in the 247th Judicial District Court of Harris County, Texas. The Transcript, which was timely filed in the Court of Appeals shows that the Respondent filed her petition for divorce on or about April 4, 1983. Thus, this case has been in the Courts for just about five years. In July, 1984, during the pendency of the divorce action, Petitioner filed for protection under the United States Bankruptcy Laws, Chapter 11, in the United States Bankruptcy Court for the Southern District of Texas, at Houston. In July, 1985, and during the pending divorce proceeding in the trial court, the bankruptcy action was converted

to a Chapter 7 action of full liquidiation of the Petitioner's estate. At all times relevant to the Texas state court appeal involved herein, the bankruptcy action was pending, and in fact it is still pending in the United States Bankruptcy Court for the Southern District of Texas, at Houston.

After the decree of divorce was entered, Petitioner properly perfected his appeal to the Texas Court Appeals by filing a statutory cost bond on September 16, 1986 [Appendix A]. The Transcript required by Texas Rules of Procedure was timely filed. Petitioner properly requested the three court reporters who took the trial to prepare a statement of facts, and offered to pay them as the work was completed. By October 30, 1986, Petitioner had filed a partial statement

of facts prepared by Mr. Clifton Smith, one of three reporters who attended the trial of the case below. Petitioner had made satisfactory financial arrangements with this Court reporter, which enabled him to comply with the Texas Rules of Appellate Procedure in this regard. The other two court reporters, Ms. Sharon Gray and Ms. Lydia Orozco, refused to make similar arrangements with Petitioner, and demanded that Petitioner make a $10,000 deposit with each of them before they would begin their work on the statement of facts. These court reporters were properly requested by Petitioner to prepare their portion of the statement of facts in accordance with the Texas Rules of Civil and Appellate Procedure. When the two court reporters failed and refused to prepare their portion of the statement

of facts without prepayment therefor, Petitioner filed a Petition for Writ of Mandamus in the Court of Appeals. This Petition was denied by the Court of Appeals.

On November 25, 1986, the two court reporters, Sharon Gray and Lydia Orozco, filed in the Texas Court of Appeals a Motion to Increase Cost Bond [Appendix B]. In their verified Motion, the court reporters stated that the statement of facts would be in excess of of 7,500 pages and that the reasonable and necessary cost to prepare a statement of facts of that size is $28,425.

On December 30, 1986, the Texas Court of Appeals entered an Order which increased the amount of the Cost Bond on Appeal to the amount of $125,000, and ordered that the bond be filed on or

before January 29, 1987 [Appendix C]. The December 30, 1986, Order included a bond amount for the attorney ad litem in the trial court, and the court reporter's bond. This Order was entered ex parte, without any opportunity for Petitioner to be heard on the issue of the increase of the "cost bond". This order jeopardized Petitioner's right to appeal the trial court judgment (Rules 46 & 60, Texas Rules of Appellate Procedure).

The time for compliance with the ex parte bond increase order was extended to March 2, 1987, and later to May 29, 1987, by Motions filed by Petitioner, claiming, among other things, that he was financially unable to comply with the cost bond order because of Bankruptcy and other financial direties [Appendix D]. On July 30, 1987, pursuant to Petitioner's Third

Motion for Extension of time, filed on June 15, 1987, the Texas Court of Appeals modified its December 30, 1986, Order reducing the amount of the Cost Bond to the total sum of Twenty-eight Thousand Four Hundred and Twenty-five Dollars ($28,425.00) [Appendix E]. The Court of Appeals also ordered that Petitioner file the additional cost bond on or before October 12, 1987. The Court of Appeals denied Petitioner's assertion of financial inability to comply with the order, without hearing, and even though his affidavit went unchallenged.

By order of November 5, 1987, the Court of Appeals extended the time to file the Cost Bond to December 30, 1987, at noon, with an indication that no extensions would be granted.

On December 30, 1987, Petitioner filed

a Motion to abate the Court's cost bond order of July 30, 1987, because Petitioner, through his attorney, had finally reached a tentative agreement with the attorney representing Ms. Sharon Gray and Ms. Lydia Orozco, for payment of the statement of facts. After filing the Motion to abate, Petitioner's counsel received a letter from Mr. William Ware, attorney for Ms. Gray, setting forth the proposed financial arrangements to obtain the statement of facts.

Upon Petitioner's motion to abate, the Court of Appeals entered an order on January 14, 1988, [Appendix F] which said:

> "This Court will rule on appellant's motion to abate the Court's cost bond order upon receipt of a copy of a signed and verified agreement between appellant, his attorney and the court reporters. In lieu of a copy of said agreement, the

> Court will accept affidavits of Sharon Gray and Lydia Orozco as to their acceptance of said agreement and an estimate of the length of the record and the time needed to file the statement of facts.
>
> It is ORDERED that a copy of such agreement or court reporters' affidavits in lieu thereof must be filed with this Court no later than 5:00 p.m., Tuesday, February 1, 1988." [emphasis supplied]

On February 1, 1988, Ms. Gray and Ms. Orozco, the proponents of the Motion to increase cost bond upon which this case was dismissed, filed in the Texas Court of Appeals, affidavits which acknowledged that they had reached a tentative agreement with counsel for Petitioner to provide a transcription of their portions of the statement of facts, and therefore obviate the necessity for an increased bond.

Nevertheless, on February 18, 1988, the Texas Court of Appeals dismissed Petitioner's appeal, ex parte, without hearing and notice to Petitioner [Appendix G & H]. Petitioner sought to revive the appeal by a motion for rehearing in the Court of Appeals, which was denied. Petitioner filed his Petition for Writ of Error in the Supreme Court of Texas [Appendix I], which was denied [Appendix J]. Likewise, his motion for rehearing in the Texas Supreme Court was denied on September 14, 1988 [Appendix K].

ARGUMENT AND REASONS FOR ALLOWANCE OF THE WRIT

I.

AS APPLIED TO PETITIONER IN HIS DIRECT APPEAL OF A TEXAS STATE COURT JUDGMENT, THE SCHEME OF THE TEXAS "COST BOND" REQUIREMENTS IN CIVIL CASES OPERATED TO DEPRIVE PETITIONER OF DUE PROCESS OF LAW, CONTRARY TO THE FOURTEENTH AMENDMENT.

Petitioner's appeal was dismissed because 1) he could not afford to prepay the cost of the statement of facts, demanded by the two state court reporters; and 2) because he could not afford to post the increased cost bond entered by the Court of Appeals without a hearing and without regard to Petitioner's financial ability to comply. Throughout all of the "extensions" reflected in the Appendix, the fact of Petitioner's pending bankruptcy and the fact of his financial inability to comply with the increased cost bond went unquestioned and unrebutted by any party and by the Texas court of appeals.

(a)

Although there is no Constitutional right to an appeal, if a State has created appellate courts as an integral part of

the system for finally adjudicating the rights of parties, the procedures used in deciding appeals must comport with the demands of the Due Process Clause of the Fourteenth Amendment.

This Court has consistently held that once a state creates adjudicative processes for resolution of claims by private citizens, access to those adjudicative processes cannot be limited, conditioned or withdrawn without comporting with Due Process requirements. Logan v. Zimmerman Bush Co., 455 U.S. 422, 426-427, 430 n. 5, 431-433 (1982). In Evitts v. Lucey, 469 U.S. 387 (1985), the Court held that, having established an appellate system, a state must "act in accord with the dictates of the Constitution -- and, in particular, in accord with the Due Process Clause" -- so as to assure that the appellate access is

not rendered "a meaningless ritual". The Court rejected the contention that because a state "need not establish a system of appeals as of right in the first instance, it is immune from all constitutional scrutiny when it chooses to have such a system." "[T]he right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms." Id. at 400-401. Rather, Evitts held that once a right to appellate access is granted, the state must "offer each defendant a fair opportunity to obtain an adjudication of his appeal. 469 U.S. at 405. In other words, each individual has a due process right to be free from irrational impediments to meaningful appellate access and cannot be deprived of that right simply because the challenged state scheme

might be reasonable - in its general application.

(b)

The basic elements of Due Process established by this Court were ignored by the Texas courts in Petitioner's direct appeal.

As the Court recognized in Boddie v. Connecticut, 401 U.S. 371 (1971), precedent for the application of the Due Process Clause to persons seeking access to the courts was limited, since most due process decisions involved rights of defendants who have been "forced" into the judicial system. 401 U.S. at 375. As presented here, Petitioner's case involves his right to access to the Texas appellate court, and thus the Due Process principles

acknowledged in **Boddie** are equally applicable here.

First, Due Process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a "meaningful opportunity to be heard". Id. at 377. Thus, what the Constitution requires is an opportunity, granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case, before a citizen can be deprived of any significant property interest.

Second, a statute or rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right, even though its general validity as a measure enacted in the

legitimate exercise of state power is beyond question. Thus, the right to a meaningful opportunity to be heard within the limits of practicality must be protected against denial by particular laws that operate to jeopardize it for particular individuals.

Third, just as a generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant, so too a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard. The State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due.

Petitioner does not contend that the Texas cost bond requirements are facially contrary to the Fourteenth Amendment. Petitioner does contend that in application, and in particular application to him in his direct appeal, the cost bond scheme violates Due Process.

This Court has recently reiterated that "as applied" adjudication is the "preferred course" of constitutional decisionmaking "since it enables courts to avoid making unnecessarily broad constitutional judgments." City of Cleburne v. Cleburne Living Center, 105 S.Ct. 3249 (1985). See also, Parham v. J.R., 442 U.S. 584 (1978); Gagnon v. Scarpelli, 411 U.S. 778 (1973). Petitioner contends that the application of the cost bond requirements under Texas law to Petitioner's case irrationally and

arbitrarily deprived Petitioner of his right to a meaningful appeal.

As in Boddie, the Texas appellate courts' refusal to "admit" Petitioner to its courts, must be regarded as the equivalent of denying him an opportunity to be heard upon his claimed right to a reversal of a state court judgment, and in the absence of a sufficient countervailing justification for the State's action, a denial of due process. Petitioner was denied any type of hearing or opportunity to be heard on the motion of the court reporters to increase the bond [in fact, Petitioner had successfully obtained a third of the statement of facts from Mr. Clifton Smith, under identical financial arrangements proposed to the two uncooperative court reporters]; the Texas court of appeals, ex parte, increased his

bond, without hearing, or even an opportunity to contest the validity or merits of the court reporters' motion; and when Petitioner uneqivocally established his inability to comply with the increased cost bond order, which was not disputed by anyone, the Texas court of appeals denied Petitioner's request for relief from the oppressive cost bond order. Ultimately, Petitioner was foreclosed from appellate review of the decree of divorce.

States such as Texas provide access to appellate courts precisely because they recognize that trial court adjudication carries a "risk of erroneous deprivation" of life, liberty, or property. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The Due Process Clause therefore prohibits states from imposing irrational and arbitrary requirements on appellate

opportunities they choose to make available. [It should be noted here that the record in the Texas court of appeals, in the statement of facts provided by Mr. Smith, revealed that Petitioner was involuntarily without counsel during approximately 1/2 of his divorce trial, and that because of serious illness of his trial counsel, he was forced to proceed with the remainder of the trial pro se. It is not surprising that Petitioner wanted to vigorously pursue his appellate rights.]

(c)

The Texas cost bond requirement is a prerequisite for an appeal in a civil case.

In this case, unlike the supersedeas

bond requirements involved in Pennzoil Co. v. Texaco, Inc., 106 S.Ct. 1519 (1987), the cost bond provisions of the Texas appellate scheme are prerequisites to the prosecution of a civil appeal in Texas. Texas Rules of Appellate Procedure 40 & 46. Although a state is not bound, by reason of providing an appellate process, also "to provide for a suspension of the judgment" during the appeal, Louisville & N.R. Co. v. Stewart, 241 U.S. 261 (1916), "a cost bond requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard." Boddie v. Connecticut, 401 U.S. 371 (1971). In this case, Petitioner was foreclosed from exercising his right to appeal by the application of the cost bond requirements to him. Such application made it

impossible for him to properly take an appeal, and resulted in an absolute bar to an opportunity to present his appeal.

II.

AS APPLIED TO PETITIONER IN HIS DIRECT APPEAL OF A TEXAS STATE COURT JUDGMENT, THE SCHEME OF THE TEXAS "COST BOND" REQUIREMENTS IN CIVIL CASES OPERATED TO DEPRIVE PETITIONER OF EQUAL PROTECTION OF LAW, CONTRARY TO THE FOURTEENTH AMENDMENT.

(a)

Petitioner unequivocally demonstrated his financial inability to comply with the increased cost bond order.

This Court has recognized that a state could not constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in Court, because the ability to pay costs in advance bears no rational relationship

to a defendant's guilt or innocence, and could not be used as an excuse to deprive a defendant of a fair trial. Griffin v. Illinois, 351 U.S. 12, 17 (1956). Griffin held that there is no "meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have enough money to pay costs in advance.

The Equal Protection principles of Griffin v. Illinois have been applied to appellants in civil cases, Lindsey v. Normet, 405 U.S. 56 (1972). Those tenets apply here. The question in Griffin was whether Illinois, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, may administer this writ of error statute in criminal

cases so as to deny adequate appellate review to the poor while granting it to all others. As in Petitioner's case here, the appellants in Griffin filed motions alleging that they were "poor persons with no means of paying the necessary fees to acquire the Transcript and Court Records needed to prosecute the appeal". As in Petitioner's case here, Griffin and Crenshaw's allegations were not denied or disputed by by any party in interest. In Griffin, as here, the motions were denied without a hearing. And, as it is unarguable in Petitioner's case here, the Griffin petitioners needed a transcript to get adequate appellate review of their alleged trial errors.

This Court has invalidated state rules giving free transcripts only to defendants who could convince the trial judge that

justice will thereby be promoted, Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214 (1958); that required indigent defendants to pay a fee before filing notice of appeal from a conviction, Burns v. Ohio, 360 U.S. 252 (1959); that allowed a meaningful appeal only if the the public defender requested a transcript, Lane v. Brown, 372 U.S. 477 (1963); that provided for a free transcript only for a defendant who could satisfy the trial judge that his appeal was not frivilous, Draper v. Washington, 372 U.S. 487 (1963); and has required that an indigent be furnished a free transcript of a state habeas corpus hearing for use on appeal from a denial of habeas corpus, Long v. District Court of Iowa, 385 U.S. 192 (1966); that an indigent prisoner denied relief in state habeas proceeding

is entitled to free transcript of proceeding even though a de novo application could be filed in a higher state court without assigning errors or referring to testimony, Gardner v. California, 393 U.S. 367 (1969); and that an indigent defendant is entitled to free transcript of preliminary hearing for use at trial, even though both defendant and his counsel were present at the preliminary hearing, Roberts v. LaVallee, 389 U.S. 40 (1967).

Lindsey v. Normet, supra, invalidated an Oregon appellate requirement that an appellant in a FED action post a bond in twice the amount of rental value of the premises. Essentially, the Court said that in order for appellate bond rules to comport with Equal Protection, such rules must be reasonably tailored to achieve the

ends sought to be protected, and they must be uniformly and nondiscriminatorily applied. And, the opportunity to appeal cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. Lindsey v. Normet, 405 U.S. 56 (1972); Griffin v. Illinois, 76 S.Ct. 585 (1956).

(b)

The Texas Court of Appeals refused, in Petitioner's case, to enforce Texas precedent against the court reporters.

Texas courts have consistently held that the statute governing court reporters and the preparation of a statement of facts imposes a mandatory duty on the court reporter to prepare the statement of facts on request, and that the court reporter has no right to require

prepayment before preparing the statement of facts. Alexander v. Bowens, 581 S.W.2d 714 (Tex. Civ. App. - Dallas, 1979 no writ); Volpe v. Stephens, 589 S.W.2d 809 (Tex. Civ. App. - Dallas, 1979). Texas courts have also held that mandamus will issue to compel performance of this duty. Fine v. Page, 572 S.W.2d 577 (Tex. Civ. App. - Eastland, 1978); City of Engleside v. Johnson, 537 S.W.2d 145 (Tex. Civ. App. - Corpus Christi, 1976).

When the two uncooperative court reporters refused to make arrangements with Petitioner for payment of the statement of facts upon completion, as they were required to do under Texas law, Petitioner sought to enforce their statutory obligations by writ of mandamus in the 14th Court of Appeals. The Texas Court of Appeals refused to enforce this

duty with respect to Petitioner's case, and thereafter entertained the two court reporter's motion to increase the bond. It is obvious that Petitioner's case was treated differently than other cases, see cases cited in the foregoing paragraph. This is particularly apparent because Petitioner had successfully filed a third of the statement of facts, prepared by another court reporter, before the Motion to Increase the Bond was filed. The court of appeals, without any requirement of a showing by the court reporters that they could not perform their statutory duty, and without hearing on Petitioner's ability to comply, increased the cost bond. This, Petitioner contends, violates Equal Protection of the law, and the Texas court of appeals administered the cost bond statute as to deny adequate appellate

review to Petitioner, while granting it to others. Griffin v. Illinois, supra.

III.

REASONS FOR ALLOWANCE OF THE WRIT

The Texas Court of Appeals and the Texas Supreme Court rejected Petitioner's claims that, as applied to him, the cost bond provisions of the Texas Rules of Appellate Procedure violated not only the Due Process and Equal Protection Clauses of the federal constitution, but also claims that the bond prerequisites violated the "open courts" provision of the Texas Constitution. Art. I, Section 13, Texas Constitution [See Petitioner's Application for Writ of Error to the Texas Supreme Court, Appendix I]. The Texas Court of Appeals also refused to entertain

Petitioner's repeated claims of financial inability to comply with the increased cost bond order [See, Opinion of the Court of Appeals, February 18, 1988, Appendix H, p. A-31].

The Court, in Pennzoil, highlighted the following as an important reason for its holding that abstention was required:

> "[T]o avoid unwarranted determination of federal constitutional questions. When federal courts interpret state statutes in a way that raises federal constitutional questions, 'a constitutional determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time -- thus essentially rendering the federal-court decision advisory and the litigation underlying it meaningless.' [citations omitted]. This concern has special significance in this case. Because Texaco chose not to present to the Texas courts the constitutional claims asserted in this case, it is impossible to be certain that the governing Texas statutes and rules

> actually raise these claims. Moreover, the Texas Constitution contains an 'open courts' provision, Art. I, Sec. 13, that appears to address Texaco's claims more specifically that the Due Process Clause of the Fourteenth Amendment. Thus, when this case was filed in Federal Court, it was entirely possible that the Texas courts would have resolved this case on state statutory or constitutional grounds, without reaching the federal constitutional questions Texaco raises in this case."

The footnote to the above illustrates the important questions raised herein and the reasons why the Writ should be granted:

> 11. See, LeCroy v. Hanlon, 713 S.W.2d 335, 340-341 (Tex. 1986) ("The open courts provision must have been intended to provide rights in addition to those in the due process provision or the former would be surplusage. Furthermore, the due process provision's general guarantees contrast with the open courts provision's specific guarantee of a right of access to the courts"); id., at 338 (noting that the Texas Supreme Court 'has been in the mainstream' of the movement of 'state courts. . . to look to their own constitutions to

protect individual rights') (citing, inter alia, Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv.L.Rev. 489 (1977)). See also, Dillingham v. Putnam, 109 Tex. 1, 14 S.W. 303 (1890) (invalidating a previous supersedeas bond statute because it effectively prevented certain parties from securing an appeal).

The relevance of the open courts provision to this case is not limited to its indication that the Texas courts may well accept Texaco's challenge on state constitutional grounds, obviating the need for consideration of the federal constitutional questions. As we explain infra, at 1527-1528, this provision also undercuts Texaco's claim that no Texas court was open to hear its constitutional claims."

It is therefore apparent in the case and questions presented by this Petition:

1. That, unlike Texaco, Petitioner presented the constitutional claims presented herein to the Texas court of appeals and the Texas Supreme Court;

2. That it is certain now that the

governing Texas statutes and rules actually raise these claims;

3. That it is certain that that Texas courts wholly refused to resolve the issues raised herein on state statutory or constitutional grounds without reaching the federal constitutional questions that Petitioner raises in this case;

4. That Texas refused to apply its more narrow "open courts" guarantee to Petitioner's case, and rejected the broader Due Process and Equal Protection assertions made by Petitioner;

5. That Texas went ashore in the movement of state courts to look to their own constitutions to protect this Petitioner's individual rights;

6. That Texas closed its courts to Petitioner to hear his federal constitutional claims;

7. That determination of the federal constitutional questions presented is not unwarranted, but rather necessary.

8. That the ultimate determination of the federal constitutional questions presented herein will not be advisory only to Texas, and will be binding on state courts, not to be discredited at any time; and

9. That the litigation underlying this decision will not be meaningless, but will rectify constitutional deprivations as to this Petitioner, and those that follow in his footsteps.

CONCLUSION

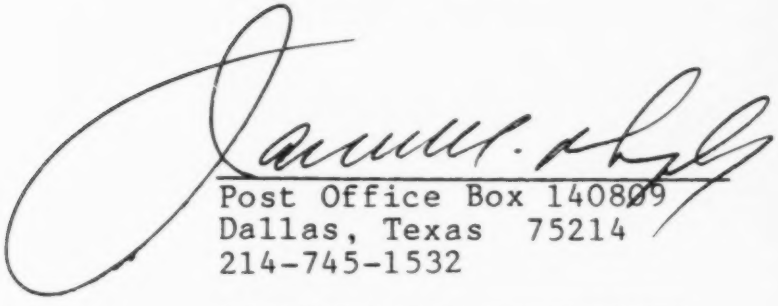
Because the Texas state courts have decided an important question of federal constitutional law which has not been, but

should be settled by this Court, and because the Texas Courts have decided a federal question in a way in conflict with applicable decisions of this Court, the Writ should be granted.

* * * * * * * * * * *

Respectfully submitted,

JAMES M. MURPHY



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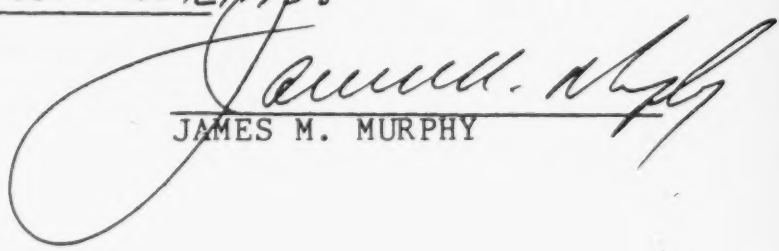
PROOF OF SERVICE

I certify that a true copy of the

foregoing Petition for Writ of Certiorari was sent by United States Mail, postage pre-paid, to Mr. Donn C. Fullenweider, Haynes & Fullenweider, 4300 Scotland, Houston, Texas, 77007, and to the Clerk of the Texas Supreme Court, P.O. Box 12248, Capitol, Austin, Texas 78711, on the 13th day of December, 1988.

DATED: December 12, 1988



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